

UNITED STATES OF AMERICA,

vs.

ROBERT BOWERS,

Defendant.

CRIMINAL ACTION

No. 18-292

APPEARANCES:

For USA:

Soo C. Song, Esq.  
Troy Rivetti, Esq.  
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For the Defendant:

Elisa A. Long, Esq.  
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Court Reporter: Karen M. Earley, RDR-CRR  
6260 U.S. Courthouse  
700 Grant Street  
Pittsburgh, PA 15219  
412-201-2660

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1 P R O C E E D I N G S

2 (April 14, 11:05 a.m. Telephone conference.)

3 THE COURT: Good morning, everyone.

4 Since we are on the phone, I would just ask  
5 each of you to identify yourselves for the purposes of  
6 the court reporter knowing who is speaking before you  
7 speak.

8 Well, I think everyone has seen the defense  
9 status report that was filed yesterday. I have reviewed  
10 that. We have some deadlines approaching, so it is  
11 important that we talk about those today. I'm just  
12 wondering who wants to start.

13 I read the defense status report. Does the  
14 government have anything they want to say about it? I  
15 know what the defense thinks. I read that.

16 MR. RIVETTI: Judge, yes. This is Troy  
17 Rivetti.

18 We have reviewed the defense filing and we  
19 agree that COVID 19 does present unique challenges.  
20 This is an unprecedented time, and we acknowledge that  
21 accommodations have been made and likely will continue  
22 to need to be made regarding scheduling and how  
23 proceedings can be held.

24 I have been working closely with Chief Judge  
25 Hornak, Chief Magistrate Judge Eddy, the probation

1 office, the marshals, the clerk's office to address many  
2 of these unique challenges and the efforts that are  
3 being made to keep the courts open and to keep cases  
4 moving. New protocols, new procedures, new processes  
5 are in place so our work can continue and these tools  
6 have enabled the work to proceed, including  
7 videoconferencing and teleconferencing capabilities on  
8 behalf of the local facilities, which include Butler  
9 County Prison where this defendant is being held.

10 I confirmed with Jason Byham of the marshals  
11 that Butler County Prison does have a temporary  
12 suspension in place for two to three weeks of in-person  
13 visits but the video and telephone capabilities remain  
14 operational and available.

15 So, Your Honor, given that and the procedural  
16 posture of this case, we don't think that the requested  
17 relief sought in the defense motion is warranted.

18 At the October telephone status conference,  
19 this Court explained the manner in which pretrial  
20 motions should proceed, what the first round would be  
21 and that first round of motions defense filed in  
22 December, but at the October conference, the Court  
23 forecasted what the next set of motions would be,  
24 including motions challenging the indictment, the jury  
25 plan, and the notice of intent.

1           The jury plan I think is a unique issue. We  
2 can set that aside for now, but the other motions are  
3 primarily legal in nature and we do believe that once  
4 defense counsel had filed their motions in December,  
5 they then had months to work on this next round of  
6 motions.

7           So, we do believe that work should have  
8 continued and the work can continue during these times.  
9 Certainly, we recognize perhaps a week or two extension  
10 of the current deadline might be needed to finalize  
11 these motions, to consult with Mr. Bowers but we don't  
12 think this case, given how long it has been pending,  
13 should be just put on ice for the next six weeks.

14           We recognize COVID 19 presents unique  
15 challenges and we are willing to make appropriate  
16 accommodations, but we don't think the relief requested  
17 in this status report is warranted.

18           THE COURT: Let me ask you, anybody from the  
19 defense, whoever wants to answer, do you have any idea  
20 of what the progress is with the jury records?

21           MS. LONG: We do not have an update, Your  
22 Honor. This is Elisa Long.

23           THE COURT: Okay. Because I do think they do  
24 present a unique challenge. In terms of the motion to  
25 dismiss the indictment and the challenges to the notice

1 of intent, I know what you said in your status report  
2 but maybe you can elaborate a little on what you're  
3 thinking -- by the way, I want to make clear on the  
4 record, I was told, Ms. Long, that you had indicated  
5 that Mr. Bowers waived his appearance for this  
6 proceeding, is that correct?

7 MS. LONG: That is correct, Your Honor.

8 THE COURT: Okay. So, I don't know if you  
9 want to elaborate a little about the motion to dismiss  
10 the indictment and the challenges to the notice of  
11 intent.

12 MS. LONG: Sure.

13 THE COURT: In light of what Mr. Rivetti said.

14 MS. LONG: Correct.

15 So, we have continued to do the work that we  
16 can do. We have continued, even though we are all  
17 teleworking and Mr. Novara and I were, in large part,  
18 responsible for trying to move our office to  
19 teleworking, the issue really is, and we have continued  
20 to research, we understand that this is the next round  
21 of motions that the Court indicated on October 31, but  
22 it's our position we can't really adequately communicate  
23 with Mr. Bowers about these motions and about the Court  
24 Orders that were handed down recently in April over the  
25 phone or over videoconference.

1           We have tried to do -- tried to communicate  
2 with him through various means that are available to us  
3 at the Butler County Prison. They are inadequate for a  
4 give and take, for meaningful discussions to discuss  
5 documents, to discuss legal theories and valid  
6 strategies. We cannot share discovery with him unless  
7 we are in person.

8           So, for all of these reasons we don't think we  
9 can responsibly and in accordance with our heightened  
10 duty because this is a capital prosecution, that we can  
11 and should be filing significant motions without  
12 having -- without consulting with him and having  
13 interaction with him that is meaningful.

14           These are actions through the  
15 videoconferencing and telephone that just are not  
16 adequate. We have consulted with the mental health  
17 expert. He has underscored the need for us -- the  
18 importance in a capital prosecution where the government  
19 is seeking the death penalty and has chosen to make this  
20 a capital prosecution, we need to be communicating with  
21 our client in person. That is the way to do that, that  
22 is the standard of care that is our duty as defense  
23 counsel.

24           So, while we can prepare and research, we  
25 cannot responsibly accomplish and file without

1 complications to Mr. Bowers.

2 THE COURT: Okay. Just so I'm clear. What  
3 the defendant is asking is an order suspending all  
4 deadlines at least until the end of May when we will  
5 have another status conference and I think from what I  
6 heard, that the government is opposed to this except for  
7 perhaps the challenges to the jury.

8 MS. SONG: That is correct, Your Honor. This  
9 is Soo Song.

10 THE COURT: Okay. Just so I know where both  
11 of you are. I got that.

12 Anything else anybody wants to talk about?  
13 Are there other issues that you might be anticipating  
14 that you would be -- that you can talk about today in  
15 terms of motions to be filed, Ms. Long or Mr. Novara or  
16 Ms. Clark, any of you?

17 MS. LONG: I think Mr. Novara wanted to  
18 address this.

19 MR. NOVARA: Sure. Your Honor, this is  
20 Michael Novara.

21 I worked with Troy and with the Chief Judge as  
22 well in all of these matters trying to keep things  
23 moving and it has been rather tricky.

24 I know we started out focusing specifically on  
25 these motions but I don't want us to lose track of the

1 idea that this pandemic was unexpected to everyone and  
2 has essentially taken a huge chunk of time away from our  
3 ability to focus on this case.

4 So, in terms of specific motions, that's one  
5 thing; but we are really kind of behind the eight ball  
6 in many ways as set forth in our status report. We have  
7 many obligations that take us away from focusing right  
8 now.

9 What we're just asking for is what every other  
10 litigant in this district is asking for and expecting.  
11 As you know from Judge Hornak's I think it's March 13  
12 Order staying all the jury trials in this district,  
13 which I expect will be extended shortly --

14 THE COURT: Well, we're having a meeting today  
15 at noon. I'll be talking -- you'll probably be getting  
16 an update on that in some sort of order filed in the  
17 next few days.

18 Mr. Novara, you can finish and then we'll go  
19 on.

20 MR. NOVARA: Paragraph 3, he makes it clear  
21 to the sense, judicial officers will apply the  
22 principles of flexibility and accommodation to  
23 reasonable requests for filing and scheduling  
24 adjustments necessitated by reasonable and fact-based  
25 travel, health, and safety concerns and that's really



1 just what we're asking for. So, every other litigant is  
2 asking and getting these accommodations.

3 Again, these are very weighty proceedings and  
4 we think that it's more appropriate now given this case  
5 for us to get that accommodation.

6 MS. LONG: Your Honor, this is Elisa Long. If  
7 I can address one additional thing.

8 I think Mr. Rivetti said he wouldn't be  
9 opposed to a week extension of time and I think that's  
10 really -- that doesn't adequately accommodate the  
11 disruption and the delay that has been caused by the  
12 pandemic.

13 I think we can -- if the Court were to set a  
14 status conference in May, that assuming we would be able  
15 to have communication, amenable communication with  
16 Mr. Bowers, that we would be prepared to file motions in  
17 early June, but we would need to have that critical  
18 communication with Mr. Bowers before we do that.

19 THE COURT: Thank you.

20 Ms. Song, you wanted to talk?

21 MS. SONG: Yes, Your Honor.

22 I just wanted to respectfully address the  
23 challenges to the indictment should have been  
24 contemplated and certainly have been worked on since  
25 January 29 of 2019. The notice of intent in this case

1 was filed in August of 2019. These are primarily legal  
2 challenges that the defense has had a significant amount  
3 of time to prepare their filing on.

4 Because this case is so important and because  
5 we do have a defendant in custody, it is a capital case,  
6 we have an extraordinary number of victims who were  
7 severely impacted, we think as any other case in this  
8 district under less than optimal circumstances we need  
9 to work together to move it forward.

10 So, for that reason, we discourage suspending  
11 the deadlines and we think that the Court can and should  
12 accommodate the defense by giving them a couple more  
13 weeks, if necessary, but we do think motions can  
14 proceed.

15 THE COURT: Okay. Well, I'm going to  
16 be -- first of all, I'm going to be mulling this over  
17 but I am going to get an Order out shortly, I can  
18 guarantee you all of that.

19 What other issues did you want to discuss  
20 today?

21 MS. LONG: Your Honor, I just wanted to add  
22 one additional thing on this point before we move on to  
23 additional issues. This is Elisa Long.

24 With respect to the videoconferencing with  
25 Mr. Bowers, Judge Hornak's Order allowing

1 videoconferencing consistent with the CARES Act that was  
2 passed requires that the Court before the proceedings  
3 begin and before the defendant is permitted to appear  
4 via videoconference, that the Court find for specific  
5 reasons that the proceedings cannot be further delayed  
6 without serious harm to the interest of justice.

7 I just don't think what we're requesting here,  
8 basically a six-week continuance of the status  
9 conference, really does harm to the interest of justice.

10 The government can't show there is serious  
11 harm in putting this off for several weeks until we can  
12 better understand the circumstances and better figure  
13 out how we can effectively communicate with our client  
14 in this matter.

15 MR. RIVETTI: This is Troy Rivetti. If I can  
16 briefly respond.

17 The CARES Act recognizes that there are  
18 unique -- these are unique circumstances. It recognizes  
19 that for felony guilty pleas or sentencings to proceed,  
20 the defendant needs to waive their right to be  
21 physically present; but the CARES Act also recognizes  
22 that the important aspect of the defendant being  
23 physically present before the judge can be  
24 meaningfully addressed by videoconferencing and the  
25 judge is able to assess the demeanor of the defendant,

1 the judge is able to assess whether the defendant is  
2 understanding and making meaningful waivers of rights  
3 and the like.

4 These are not ideal conditions but given the  
5 technology available, there still can be meaningful  
6 consultation.

7 THE COURT: Okay. That having been said,  
8 I'll, as I said, consider all that.

9 What else did anyone want to address today?

10 MS. SONG: Your Honor, we do have a pretrial  
11 motions deadline set.

12 THE COURT: Ms. Song, thank you. We are going  
13 to need a motion to extend that pretrial motions  
14 deadline because it expires on April 23.

15 So, Ms. Long or Mr. Novara or Ms. Clark, do  
16 you want to address that?

17 MS. LONG: Your Honor, we would file a motion  
18 and I would hope that the government would consent to  
19 extend that for at least 90 days.

20 THE COURT: Any problem with that, Ms. Song?

21 MS. SONG: No, Your Honor. We would consent  
22 to 90 days.

23 THE COURT: So, if you can file that before  
24 April 23.

25 MS. LONG: Okay. We'll do that.

1 THE COURT: Thank you.

2 Thank you for reminding me of that, Ms. Song.

3 Anything else?

4 MS. SONG: Not from the United States, Your  
5 Honor.

6 MS. LONG: Not from the defense, Your Honor.

7 THE COURT: Okay. So you're waiting for an  
8 Order from me and I'm waiting for a motion from  
9 Ms. Long, which is consented to by the government, and I  
10 will certainly sign that for an extension of 90 days  
11 which would take us to the end of July.

12 In any event, I think whatever happens, we are  
13 going to still have a status conference before then.

14 I think maybe then if nobody has anything  
15 else -- I don't know who is on the line from my office,  
16 everybody. Can anybody think of anything else that we  
17 need to resolve here?

18 THE LAW CLERK: No.

19 THE COURT: No?

20 THE LAW CLERK: Wait, Judge. This is Carolyn.  
21 I think you were going to raise the issue of --

22 THE COURT: Yes. I know. Thank you, Carolyn.

23 You know, I'm directing this to Ms. Song,  
24 Mr. Rivetti, you know that the defense has filed a  
25 motion to file a motion ex parte and under seal. We

1 know that it is a more detailed status report from the  
2 one that was filed at Document No. 218.

3 Do you have any objection to my granting that?

4 MR. RIVETTI: Your Honor, again, I think it's  
5 our standard position that we are at a disadvantage in  
6 not knowing exactly what is the issue. We generally  
7 object to anything that is other than administrative  
8 matters or non-merits issues.

9 Our position with respect to ex parte sealed  
10 filings I think has been set forth in our prior  
11 pleadings.

12 If it's for payment of experts, that's one  
13 thing. If it goes more to a merits issue, we do object.

14 THE COURT: Well, it is an ex parte pleading  
15 which would identify additional impact on the work  
16 product of the defense team, which is what it has been  
17 described as, and you would object to that?

18 MR. RIVETTI: We definitely do not want to  
19 have access to the defense work product, Your Honor.  
20 So, we don't object to a pleading that could be placed  
21 before the Court explaining work product as long as it  
22 is addressing administrative matters.

23 THE COURT: Do you want to say anything about  
24 that Ms. Long, Mr. Novara, or Ms. Clark?

25 MS. LONG: No, Your Honor. I think we set

1   forth the information that we were seeking to provide.  
2   The Court has described specifically to the defense team  
3   investigation and our work with the experts, as we said  
4   in the ex parte motion, and we think it would be helpful  
5   for the Court to have and to understand the impact that  
6   this pandemic has had on our work.

7               THE COURT:   Okay.   Does that help in any way,  
8   Mr. Rivetti, or not?

9               MR. RIVETTI:   I really don't think that it  
10   does, Your Honor, because I don't know if the relief  
11   requested is just payment for an expert or if it's  
12   additional time and an extension for pretrial motions.

13              That would go more towards the type of issue  
14   that I think the government needs to be informed about  
15   so we can weigh in on that.

16              THE COURT:   Well, the request for additional  
17   time comes into the status report that we have all seen.

18              MR. RIVETTI:   Yes, Your Honor.

19              MS. LONG:   It is not a request for an  
20   extension of time.   It's a status report, Your Honor,  
21   providing additional details about our investigation and  
22   our work with experts, the details that the government  
23   has agreed they are really not entitled to have and  
24   should not have.

25              THE COURT:   Okay.   Does that help any more,

1 Mr. Rivetti?

2 MR. RIVETTI: It's helpful, Your Honor. I  
3 don't understand why something like this needs to be  
4 filed with the Court, so it's hard for me to say more  
5 than that, why this information needs to be set forth  
6 before the Court. I don't understand why it needs to be  
7 set forth before the Court.

8 THE COURT: I see. All you really said,  
9 Ms. Long, was that it would be helpful. Is that what it  
10 is? You thought it would be helpful?

11 MS. LONG: Your Honor, as you are making this  
12 decision, I think it would be helpful for you to see in  
13 a little bit more specificity, it's not like a long  
14 filing, what the hurdles have been in particular so that  
15 you can understand why we're asking for what we are  
16 asking for and then the support for it.

17 THE COURT: In terms of what, your  
18 investigation?

19 MS. LONG: The investigation and our work with  
20 experts and how the pandemic has impacted both of those  
21 and it's information I do think that would be very  
22 helpful for the Court. The only reason we cannot put it  
23 in a public filing for obvious reasons, but we think the  
24 Court should know it because it will inform the Court's  
25 decision.



1           It's the circumstances under which we are  
2     operating and we think it would be very helpful to the  
3     Court and inform your decision as to whether or not to  
4     set deadlines right now or to put off this until the end  
5     of May or some later date when we can more realistically  
6     have a better understanding of where we are.

7           MS. SONG: Your Honor, his is Soo. If it is  
8     bolstering the defense argument to move the deadline, we  
9     don't think that's appropriate and we do object because  
10    we can't respond to that in this hearing or on paper if  
11    we don't know what additional information the defense is  
12    putting before the Court in supporting their argument to  
13    push off the deadline.

14          THE COURT: Ms. Long, anything you want to  
15    say?

16          MS. LONG: I mean, Your Honor, we simply  
17    cannot provide that to the government because it's  
18    confidential and privileged information but we think the  
19    Court should have it in making its decision.

20          THE COURT: Okay. Carolyn, does that satisfy  
21    you that we have addressed this?

22          THE LAW CLERK: Yes, Judge.

23          THE COURT: Okay. So there is nothing else  
24    from anyone, is that correct?

25          MS. SONG: That's correct, Your Honor.

1 MS. LONG: Yes.

2 MR. NOVARA: Yes, Your Honor.

3 THE COURT: Okay. Then, thank you all and I  
4 will be in touch soon.

5 Stay safe.

6 (Whereupon, the above teleconference was  
7 concluded at 11:30 a.m.)

8 - - -

9  
10 I hereby certify by my original signature  
11 herein, that the foregoing is a correct transcript, to  
12 the best of my ability, from the record of proceedings  
13 in the above-entitled matter.

14

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16 S/ Karen M. Earley

17 Karen M. Earley

18 Certified Realtime Reporter

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